

This Opinion is not a
Precedent of the TTAB

Mailed: August 24, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Caracol Televisión S.A.
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Serial Nos. 87916944 and 87916948¹
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Susan B. Flohr and Bradford C. Craig of Blank Rome LLP
for Caracol Televisión S.A.

John Hwang, Trademark Examining Attorney, Law Office 114,
Nicole Nguyen, Acting Managing Attorney.

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Before Cataldo, Wolfson and Pologeorgis,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Caracol Televisión S.A. (“Applicant”) seeks registration on the Principal Register



of EL CABO in standard characters and the composite  EL CABO as marks
identifying:

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¹ These appeals are consolidated as discussed below.

broadcasting and transmission of television programs; telecommunication services, namely, transmission of voice, data, graphics, images, audio and video by means of telecommunications networks, wireless communication networks, and the Internet; broadcasting of television and radio programs; broadcasting of programs related to telecommunications; audio broadcasting; broadcasting of cable television programs; broadcast of radio programs; broadcast transmission by satellite; sending of electronic messages; electronic mail services; broadcasting services, namely, transmission of advertising programs and media advertising communications via digital communications networks, in International Class 38;

entertainment services via television programs in the fields of drama, action, and comedy; live presentations, televised and movie appearances by a professional entertainer and comedic performances associated therewith, presentation of live performances, theatre productions; entertainment services in the nature of production of motion pictures, television shows, multimedia entertainment content; presentation of live show performances, in International Class 41.²

The Trademark Examining Attorney has refused registration of Applicant's marks as to both classes of services under Trademark Act Sections 1, 2, 3 and 45, 15

² Application Serial Nos. 87916944 and 87916948 both were filed on May 11, 2018, based on Applicant's assertion of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). Applicant provides the following translation of the wording in the marks: "The English translation of 'EL CABO' in the mark is 'THE CORPORAL.'" Applicant subsequently filed Statements of Use in both applications asserting August 11, 2018 as a date of first use anywhere and in commerce in connection with both classes of services.

In application Serial No. 87916948, Applicant provided the following description of the mark and color statement: "The mark consists of the drawing of a bust of a man with no facial features wearing dark sunglasses with dark hair, handlebar mustache and sideburns, wearing a necklace, over a collared shirt that has two 2 dark stripes down the left arm, and a cowboy hat with indentations and four 4 'X's across the brim, above the wording 'EL CABO' in capital letters." "Color is not claimed as a feature of the mark."

Serial Nos. 87916944 and 87916948

U.S.C. §§1051-1053, 1127 for failure to function as a mark because the applied-for marks merely identify one of many characters in a television series.³

When the refusal was made final, Applicant appealed the refusal of registration as to the services identified in Class 41. We affirm the refusal to register as to the identified Class 41 services in both applications.

I. Proceedings Consolidated

When, as here, an applicant has filed *ex parte* appeals to the Board in two co-pending applications, and the cases involve common issues of law or fact and are presented on highly similar records, the Board, upon request by the applicant or examining attorney or upon its own initiative, may order the consolidation of the appeals for purposes of briefing, oral hearing, or final decision. *See, e.g., In re S. Malhotra & Co.*, 128 USPQ2d 1100, 1102 (TTAB 2018) (Board sua sponte consolidated two appeals); *In re Anderson*, 101 USPQ2d 1912, 1915 (TTAB 2012) (Board sua sponte consolidated two appeals); *In re Country Music Association, Inc.*, 100 USPQ2d 1824, 1827 (TTAB 2011) (same); *see also* Trademark Trial and Appeal Board Manual of Procedure (TBMP) § 1214 (2022).

Accordingly, the Board hereby consolidates these appeals. In this decision, we will refer to the record in Application Serial No. 87916944 unless otherwise indicated.

³ Examining Attorney's brief, 10 TTABVUE 5.

Page references to the application record refer to the online database pages of the USPTO's Trademark Status & Document Retrieval (TSDR) system. References to the briefs on appeal refer to the Board's TTABVUE docket system.

Serial Nos. 87916944 and 87916948

II. Applications Deemed Abandoned as to Class 38 Services

The involved applications recite services in International Classes 38 and 41. The Examining Attorney's refusal of registration applies to both Classes of services.⁴ However, in its appeal briefs, Applicant addresses the refusal of registration only as to the Class 41 services.⁵

“If an application contains multiple classes and the applicant wishes to appeal a final refusal or requirement in some but not all of the classes, the applicant should indicate in the notice of appeal the classes in which the refusal or requirement is being appealed. Any remaining classes for which there is a final refusal or requirement that is not the subject of the appeal will be deemed abandoned.” TBMP §§ 1202.01; 1202.05. *See also, e.g., In re MGA Entertainment Inc.*, 84 USPQ2d 1743, 1745 n.1 (TTAB 2007) (applicant did not appeal requirement to delete Class 28 goods, and Board treated Class 28 goods as deleted from application).

Accordingly, Applicant's applications are deemed abandoned solely in connection with the services recited in Class 38.

III. Failure to Function as a Mark

We now turn to the substantive refusal, under Sections 1, 2, 3, and 45 of the Lanham Act, 15 U.S.C. §§ 1051, 1052, 1053 and 1127, that the applied-for marks do not serve to “identify and distinguish the services of one person . . . and to indicate the source of the services.” 15 U.S.C. § 1127 (definition of “service mark”).

⁴ July 24, 2020 Non-final Office Action at 2; April 26, 2021 Final Office Action at 1-2.

⁵ 8 TTABVUE 5-6, 8 (Applicant's brief).

“[A] proposed trademark is registrable only if it functions as an identifier of the source of the applicant’s goods or services.” *In re DePorter*, 129 USPQ2d 1298, 1299 (TTAB 2019) (citing 15 U.S.C. §§ 1051, 1052, and 1127). “The Trademark Act is not an act to register mere words, but rather to register trademarks. Before there can be registration, there must be a trademark, and unless words [or other designations] have been so used they cannot qualify.” *Id.* (quoting *In re Bose Corp.*, 546 F.2d 893, 192 USPQ 213, 215 (CCPA 1976)); *see also In re Yarnell Ice Cream, LLC*, 2019 USPQ2d 265039 [*16] (TTAB 2019); *In re Int’l Spike, Inc.*, 196 USPQ 447, 449 (TTAB 1977) (law pronounced in the *Bose* case is just as applicable to pictures and illustrations as it is to words: Trademark Act is for the registration, not the creation, of trademarks). There are many reasons a proposed mark may fail to function as one.

Sections 1, 2, 3, and 45 of the Trademark Act provide the statutory basis for refusal to register subject matter that fails to function as a service mark. 15 U.S.C. §§ 1051, 1052, 1053, and 1127. Specifically, Sections 1, 2, and 3 provide, *inter alia*, for the application and registration on the Principal Register of trademarks “by which the goods [or services] of the applicant may be distinguished from the goods [or services] of others” and Section 45 defines a “service mark,” in pertinent part, as “any word, name, symbol, or device, or any combination thereof used by a person ... to identify and distinguish the services of one person ... from the services of others and to indicate the source of the services, even if that source is unknown.”

As these provisions make clear, the Office is statutorily constrained to register matter on the Principal Register if and only if it functions as a mark. *See, e.g., In re*

Serial Nos. 87916944 and 87916948

The Ride, 2020 USPQ2d 39644, at *5-6 (TTAB 2020). “Matter that does not operate to indicate the source or origin of the identified goods or services and distinguish them from those of others does not meet the statutory definition of a trademark and may not be registered.” *Id.* (quoting *In re AC Webconnecting Holding B.V.*, 2020 USPQ2d 11048, at *2-3 (TTAB 2020)); see also *In re Vox Populi Registry, Ltd.*, 25 F.4th 1348, 2022 USPQ2d 115, at *2 (Fed. Cir. 2022) (“Under the Lanham Act, ‘no service mark by which the services of the applicant may be distinguished from the services of others shall be refused registration on the principal register on account of its nature’ subject to certain exceptions. 15 U.S.C. §§ 1052-53. One of these exceptions is that a service mark must function to ‘identify and distinguish the services of one person . . . from the services of others and to indicate the source of the services.’ 15 U.S.C. § 1127.”); *In re Standard Oil Co.*, 275 F.2d 945, 125 USPQ 227, 228 (CCPA 1960 (“The Trademark Act is not an act to register words but to register trademarks.”).

“An applicant’s proposed mark must, by definition, ‘identify and distinguish his or her goods ... from those manufactured or sold by others and ... indicate the source of the goods, even if that source is unknown.” *Univ. of Ky. v. 40-0, LLC*, 2021 USPQ2d 253, at *24 (TTAB 2021) (quoting Trademark Act Section 45, 15 U.S.C. § 1127). “Hence, a proposed trademark is registrable only if it functions as an identifier of the source of the applicant’s goods or services.” *Id.*

“[N]ot every designation adopted with the intention that it performs a trademark function and even labeled as a trademark necessarily accomplishes that purpose....”

Serial Nos. 87916944 and 87916948

Am. Velcro, Inc. v. Charles Mayer Studios, Inc., 177 USPQ 149, 154 (TTAB 1973); *see also Roux Labs., Inc. v. Clairol, Inc.*, 427 F.2d 823, 166 USPQ 34, 39 (CCPA 1970).

The critical inquiry in determining whether a designation functions as a mark is how the designation would be perceived by the relevant public. To make this determination we look to the specimens and other evidence of record showing how the designation is actually used in the marketplace.

In re Eagle Crest Inc., 96 USPQ2d at 1229.

Thus, the central question in determining whether Applicant's proposed marks function as service marks is the commercial impression they make on the relevant public (e.g., whether the terms sought to be registered would be perceived as marks identifying the source of the services). *In re Aerospace Optico, Inc.*, 78 USPQ2d 1861, 1862 (TTAB 2006) ("the mark must be used in such a manner that it would be readily perceived as identifying the specified goods [or services]. ... The mere fact that a designation appears on the specimen of record does not make it a trademark. ... A critical element in determining whether matter sought to be registered as a trademark is the impression the matter makes on the relevant public." (citations omitted)). *See also In re The Ride LLC*, 2020 USPQ2d 39644 [*6].



We must assess whether Applicant's proposed marks, EL CABO and  EL CABO , function as marks based on whether the relevant public, i.e., purchasers or potential purchasers of Applicant's Class 41 services, would perceive them as identifying

Serial Nos. 87916944 and 87916948

Applicant's services and their source or origin. *See e.g. In re TracFone Wireless, Inc.*, 2019 USPQ2d 222983, at *1-2 (TTAB 2019) ("The key question is whether the asserted mark would be perceived as a source indicator for Applicant's services."); *In re Aerospace Optics, Inc.*, 78 USPQ2d 1861, 1862 (TTAB 2006) (same).

"[E]vidence of the public's perception may be obtained from 'any competent source, such as consumer surveys, dictionaries, newspapers and other publications.'" *Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 114 USPQ2d 1827, 1833 (Fed. Cir. 2015) (quoting *In re Northland Aluminum Prods., Inc.*, 777 F.2d 1556, 1559 (Fed. Cir. 1985)). Internet evidence is relevant to show consumer perception. *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1833 (Fed. Cir. 2007). Because there are no limitations to the channels of trade or classes of purchasers of the Class 41 services identified in the applications, the relevant consuming public comprises all potential purchasers of these services. *See CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983).

A. The Examining Attorney's Evidence

The specimen submitted by Applicant is reproduced below in its entirety.⁶

⁶ July 2, 2020 Statement of Use.

The screenshot shows the Caracol International website for the TV series "The Cartel". The URL is https://www.caracolinternacional.com/en/production/cartel. The page features a large background image of a man in a suit holding a woman's face. A video player in the center shows a "The Cartel Demo" with a play button. Below the video is a "Synopsis" section with a vertical scrollbar. The "Cast" section is partially visible, showing a character profile for "Robinson Diaz as El Cabo" with a stylized illustration of a man in a hat and sunglasses. The word "Gallery" is visible at the bottom of the cast section.

https://www.caracolinternacional.com/en/production/cartel

Series 57 episodes 2008

The Cartel Demo

Synopsis

The story revolves around 10 friends, all of them members of a dangerous drug cartel, whose ambition for power and money will cause them to eventually kill each other. Martin Gonzalez, a determined and daring adolescent, from a middle class background, desperately begs his bosom friend to convince his eldest brother to let him be initiated into the drug trafficking world, as an assistant in a cocaine laboratory. Ignoring that this decision will be the starting point for a frenzied and stormy life and that it will change his destiny for good, Martin begins to work at the laboratory, backed by the big drug boss in the region: Oscar Cadena. Money pours in and the goods are delivered smoothly. As days go by, Martin sees his fortune grow by leaps and bounds. He soon falls in love with Sofia, a gorgeous young girl that aspires to become the National Beauty Queen. Feeling ashamed of where his wealth comes from, Martin lies to Sofia about his profession until he is so loaded that no possible lie can be bought. Sofia demands that he chooses between her and drug dealing. Martin will try to give up but he is already deeply involved in a world from which you cannot escape. What begins as an adventure on which, as youngsters, they embark upon with the only aim of becoming wealthy will end up in tragedy for each and every one of them. The pact they seal when they set out will break in a thousand pieces when they are faced with the prospect of being killed or

Cast

Robinson Diaz
as El Cabo

EL CABO is one of the most important characters of this revealing TV series, featuring the life of Milton Jiménez, better known as El Cabo, Main hitman for the Cartel of the Pacific. He is an expert in designing terrorist attacks. He is forever loyal to his boss Oscar Cadena, and he will eliminate anyone that steps in his path. He survives the bullets of his enemies and without thinking about it becomes the kingpin of the Cartel, imposing his rules of violence. He declares a war on Don Mario that leaves thousands of deaths.

EL CABO

Gallery

The lower portion of Applicant's specimen referencing "El Cabo" is enlarged below.



The Examining Attorney submitted screenshots from the Wikipedia.org entry for the El Cartel television program. The most relevant screenshots are reproduced in part below.⁷

⁷ July 24, 2020 Non-final Office Action at 4-5.

El cartel (TV series)

From Wikipedia, the free encyclopedia

[Jump to navigation](#)

El Cartel de los Sapos (English title: ***The Cartel of Snitches***) or ***El Cartel*** is a Colombian television series that first aired on June 4, 2008 on the Colombian network Caracol TV. *El Cartel* stars Manolo Cardona, Karen Martínez, Diego Cadavid, and Robinson Díaz and is based on the 2008 novel by the same name by Andrés López López, alias *Fiorecita* ("Little Flower"), a former drug dealer who, while in prison, wrote the fictionalized account of his experiences in the Cali Cartel and of what happened within the Norte del Valle Cartel. In the TV series, which Lopez also wrote, the characters and locations from the book were changed.^{[1][2]}

Contents [\[hide\]](#)

- 1 Synopsis
- 2 Characters
- 3 Associated media
- 4 References
- 5 External links

Synopsis [\[edit\]](#)

Two friends enter the illegal drugs business, thinking it is the fastest way to become rich. The illegal drug trafficking world seems attractive to all these middle-class people, who overlook the associated dangers and legal problems.

This choice begins a turbulent and troubled lifestyle that will change their fates forever. Martín, alias "*Fresita*", gets a job in a drugs lab sponsored by the big boss Óscar Cadena (Fernando Solorzano). Martín learns the business quickly and starts to send illegal drugs to the United States, while his boss makes an alliance with the Villegas Brothers, from the West Cartel, to take down the biggest drug dealer ever: Pablo Escobar.

With Escobar down, a new cartel is up: The Pacific Cartel in Colombia, led by Óscar Cadena, so Óscar (the teacher) and Martín (the student) make a pact of friendship and business.

Martín becomes a rich man and he falls for Sofía (Karen Martínez), a beautiful woman, but he wins her heart by lying to her. But Sofía discovers the origin of Martín's wealth, and he has to choose: Sofía or the business.

Óscar helps the police finish the West Cartel. The *snitches* (*sapos*) make war between these criminal machines to the point of breaking.

Oscar has been killed and decided to make Martín as the owner of the cartel. Martín refuses to take part in this war and decides to go to Miami with Sofía and his children, unaware that Miami is no longer a safe place. He continues his illegal activities, meanwhile watching enemies kill his old friends.

As increasing numbers of his business partners and brothers die or get caught, Martín is forced to run to Mexico, looking for protection. He realizes too late that, in this business, you can never win. So he becomes a *sapo* and tells his tale to the DEA.

Characters [\[edit\]](#)

The screenshot directly above discusses the *El Cartel* or *The Cartel* television series, also known as *El Cartel de los Sapos* or *The Cartel of Snitches*, its main story and protagonists. The screenshot below is the first of four pages listing the characters in the *El Cartel* series.⁸ The character named Milton Jiménez, alias *El Cabo*, is listed as the third character.⁹ The full listing indicates *El Cabo* is portrayed by the actor Robinson Diaz, and is based upon an actual person named Wilber Alirio Varela, alias *Jabón*.¹⁰

⁸ *Id.* at 5-8.

⁹ *Id.* at 5.

¹⁰ *Id.*

Serial Nos. 87916944 and 87916948

Caracol decided to change the characters' real names, their aliases, and some locations from the book, although the filmmakers maintained some. The following tables detail the names of the characters, their portrayers, and the real life people they represent in the series. The first table also includes [citation needed]

First Season	
Character Name – Aka	Actor
Martín González – El fresita	Manolo Cardona
Sofía (esposa de Martín)	Karen Martínez
Milton Jiménez – El cabo	Róbinson Díaz
Pepe Cadena	Diego Cadavid
Oscar Cadena	Fernando Solórzano
Álvaro José Pérez – Guadaña	Julian Arango
Amparo Cadena (esposa de Julio)	Sandra Reyes
John Mario Martínez – Pirulito	Juan Pablo Raba (1.ª season) Camilo Saenz (second season)
Julio Trujillo	Fernando Arévalo
Conrado Cadena – El mocho	Álvaro Rodríguez
Alfonso Rendón – Anestesia	Andrés Parra
Humberto Paredes Humber	Juan Ángel
Samuel Morales	Luis Alfredo Velasco
Mario Lopera – Don Mario	Santiago Moure
Gonzalo Tovar – Buñuelo	Juan Carlos Arango
Apolinar S. Santilla – el Negro Santilla	Elkin Córdoba
Eliana Saldarriaga (esposa de Pepe)	Juliana Galvis
Juanita Marín	Nataly Umaña
Juliana Morales o Estupiñán	Natalia Betancurt
Agente Sam Mathews	John Gertz
El Ovejo	Harold Córdoba
Fermín Urrego – el Tigre	Waldo Urrego
Cdte Ramiro Gutiérrez	Alberto Palacio

The Examining Attorney also submitted screenshots from the Wikipedia.org entry for the television network Telemundo¹¹ and screenshots from the webpage for the television network Univision.¹² The Examining Attorney submitted these as

¹¹ *Id.* at 16-27

¹² *Id.* at 10-15.

“evidence of traditionally accepted brand names such as UNIVISION and TELEMUNDO for the referenced services.”¹³

B. Arguments and Analysis

The Examining Attorney argues that the specimen of record clearly indicates that The Cartel, in several permutations (including El Cartel, El Cartel de los Sapos and The Cartel of Snitches), is the name of the television series and “is likely to be perceived by consumers as the title and source indicator for the TV entertainment services in class 41.”¹⁴ “In contrast, El Cabo appears at the bottom of the web screenshot in standard small font alongside a caricature depiction of a man wearing a shirt labeled EL CABO. Users can flip back and forth through other names of the cast of characters in the TV show by pressing an arrow button left or right.”¹⁵ Thus, the Examining Attorney argues, the applied-for marks merely identify a character in the television series, and fail to function as marks for the recited services.

We agree with the Examining Attorney that the specimen suggests that viewers of the web page(s) may flip back and forth between different characters. However, neither the specimen of use, nor the description of the mark, nor any argument on the part of Applicant suggest that the stylized figure representing EL CABO is wearing a “shirt labeled EL CABO.” To the contrary, the wording EL CABO in the

¹³ *Id.*, at 2.

¹⁴ 10 TTABVUE 6 (Examining Attorney’s brief).

¹⁵ *Id.*

composite appears below the stylized figure, and does not appear to represent the figure wearing a shirt bearing his alias.

Applicant argues:

Applicant respectfully submits that, contrary to the Examining Attorney's position, the specimen of record is an acceptable specimen showing proper use of the mark in connection with the applied-for services and should therefore be accepted. As noted above and in Applicant's Statement of Use, the specimen is comprised of a website screenshot prominently featuring the EL CABO mark in clear association with the television series "The Cartel." Although the mark appearing in the specimen is indeed the name of the character, "EL CABO" unquestionably serves not merely as a character name but also as a source indicator for Applicant and the applied-for services.¹⁶

Applicant further argues:

Here, the specimen of record unequivocally shows use of the EL CABO service mark in clear association with the television series (i.e., entertainment services), not merely as the name of the character "El Cabo." Indeed, the mark appears prominently on the specimen, which sets forth an overview of the story (under "Synopsis"), which in turn is immediately followed by the EL CABO mark and a description of "EL CABO" as "one of the most important characters of this revealing TV series." Contrary to the Examining Attorney's suggestion, "EL CABO" is not merely one of "a very large cast of characters," but rather one of the central characters to the show, and one of few whose appearance recurs in the second season of the series, "El Cartel 2" (highlighted in the Examining Attorney's evidence of record retrieved from <Wikipedia.org>). Given the importance of the EL CABO character in the show and his centrality to the storyline (as underscored by the specimen of record), consumers undeniably recognize EL CABO as an indicator of source and associate the mark with the series and, hence, the applied-for "entertainment services." Indeed, consumers would no less associate EL CABO as an indicator of source for the television show than the name of the show itself, "El Cartel," which is unquestionably a registrable source indicator for Applicant. The mere fact that "El Cabo"

¹⁶ 8 TTABVUE 10. While we examine Applicant's specimen of use in our determination of the failure to function refusal, the Examining Attorney has not required Applicant to submit a substitute specimen. As a result, the sufficiency of the specimen is not at issue apart from the refusal of registration under Trademark Act Sections 1, 2, 3 and 45.

is not also the title of the show does not undermine its source-identifying significance. The specimen is thus unequivocally an acceptable specimen that clearly shows use of the mark in direct connection with the applied-for services.¹⁷

Fictitious or fanciful characters may function to identify and distinguish the source of goods or services. *See, e.g., In re DC Comics, Inc.*, 689 F.2d 1042, 215 USPQ 394, 401 (CCPA 1982) (drawings of Superman, Batman and Joker capable of functioning as trademarks for toy dolls); *In re Red Robin Enterprises, Inc.*, 222 USPQ 911, 914 (TTAB 1984) (photograph of performer wearing mark consisting of costume acceptable for various entertainment services); *In re Fla. Cypress Gardens Inc.*, 208 USPQ 288 (TTAB 1980) (CORKY THE CLOWN used on handbills functions as a mark to identify live performances by a clown, where the mark was used to identify not just the character but also the act or entertainment service performed by the character). In each of these cases, the applicants' use of their marks on the specimens reflected that consumers would perceive the marks as indicating the source of the identified goods or services. In order to be registrable, the use of such a character must be perceived by the purchasing public not just as a character but also as a mark which identifies and distinguishes the source of the goods or services.

Where the usage of a character in the specimens of record fails to impart any commercial impression as a trademark or service mark, it is not registrable as such. *See In re Burger King Corp.*, 183 USPQ 698, 700 (TTAB 1974); *see also In re Mancino*, 219 USPQ 1047, 1048 (TTAB 1983) ("an individual's name may be

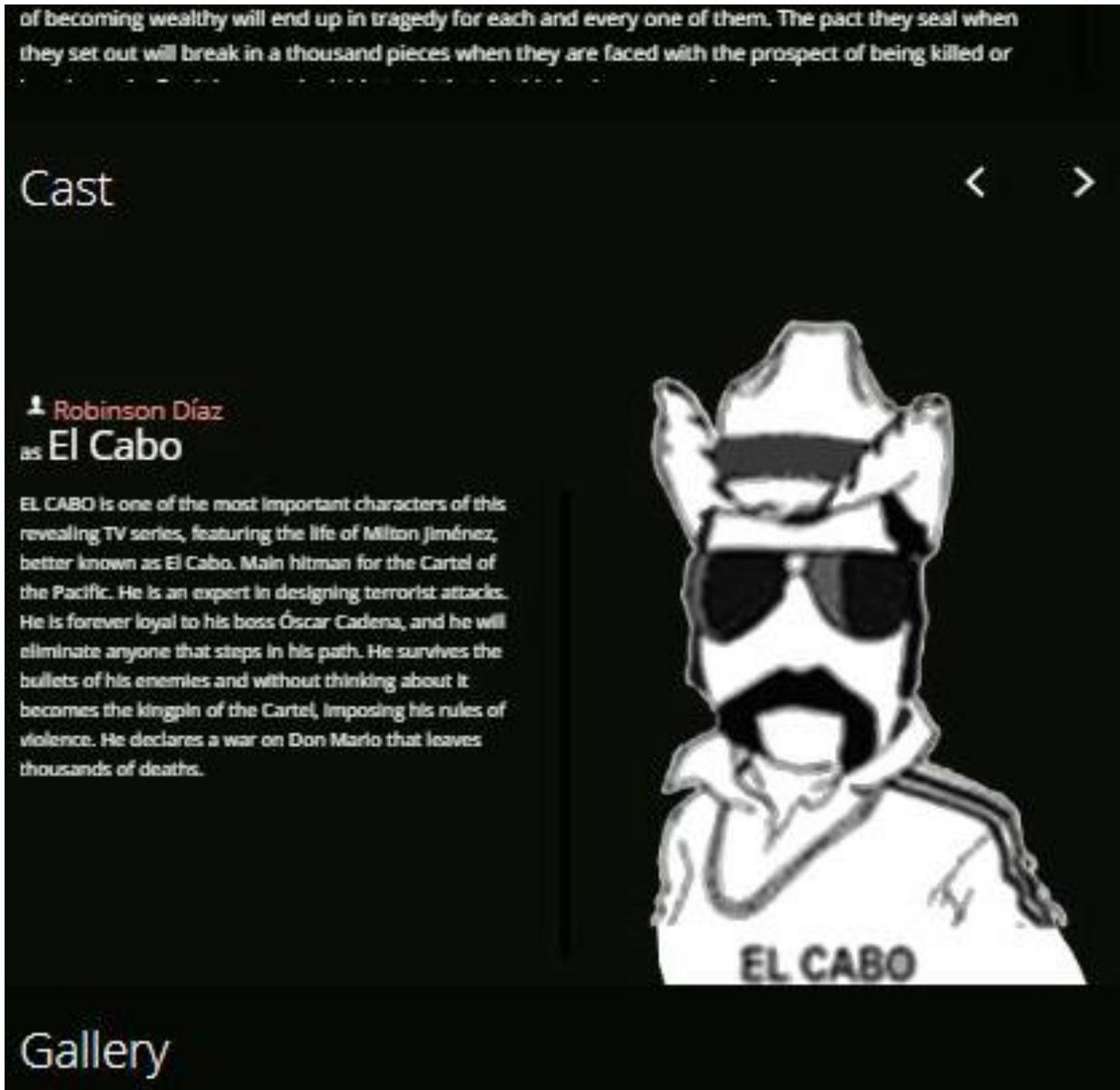
¹⁷ *Id.* at 11-12.

Serial Nos. 87916944 and 87916948

registered as a trademark or service mark only if the specimens of use filed with the application demonstrate trademark or service mark use of the individual's name."); *In re Lee Trevino Enterprises, Inc.*, 182 USPQ 253, 253 (TTAB 1974); *In re Carson*, 197 USPQ 554, 555 (TTAB 1977).

Upon close inspection of Applicant's specimen of use, we note that the language above the term "Cast" is an unfinished sentence that reads as follows: "The pact they seal when they set out will break in a thousand pieces when they are faced with the prospect of being killed or ...". There appears to be the upper portions of words below that are cut off by the presence of the lower portion, containing the word "Cast" to the left of the left and right click arrows (< >). We further note that the black background in the upper portion of the specimen appears darker than the lower portion, which appears to be a more faded shade of black.

As a result, it appears that Applicant's specimen of use consists of a combination of more than one webpage. The Examining Attorney did not refuse the specimen on this basis, and we do not speculate on the accuracy of the specimen, as regardless, the lower portion of Applicant's specimen, reproduced again below, clearly displays the term "Cast" above the name of the actor "Róbinson Diaz as El Cabo," with a description of the character as cast member Milton Jiménez, aka El Cabo. Both parts of the specimen discuss El Cabo as a character in *The Cartel*, but do not use either EL CABO or the word and design composite as an indicator of source for the television program *The Cartel*.



Simply put, the specimen does not reflect that consumers of Applicant's services



will perceive its EL CABO or EL CABO designations as trademarks indicating the source of its Class 41 television entertainment services. Applicant acknowledges that

Serial Nos. 87916944 and 87916948

its proposed marks identify a main character in its THE CARTEL television series. Applicant's specimen of record fully supports a finding that EL CABO and his pictorial representation indicate a television series character. The Examining Attorney's Wikipedia evidence buttresses this finding. While Applicant asserts its applied-for marks also indicate the source of its services, the specimens directly associate the El Cabo designations with a character in the series "The Cartel" and not with Applicant's entertainment services. We emphasize that a proposed mark must not solely "identify" the services but must also "indicate the source of the services." 15 U.S.C. § 1127. Applicant's specimens identify Applicant's television entertainment services, but do so in connection with the term El Cartel. The applied-for marks, even if they do appear on the same page, denote a character in that television series, and do not indicate the source of the services.

We will not infer that the involved designations function as marks based upon the arguments of Applicant's counsel. Applicant's "assertions are unsupported by sworn statements or other evidence, and 'attorney argument is no substitute for evidence.'" *In re OEP Enters., Inc.*, 2019 USPQ2d 309323, at *14 (TTAB 2019) (quoting *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (internal quotation omitted)).

Further, we are not persuaded by Applicant's reliance on decisions by this tribunal and other courts to allow registration of unrelated designations (The Krusty Crab, Sabaac, Batmobile, Kryptonite) as trademarks for various goods and services.¹⁸ The

¹⁸ *Id.* at 10-11.

registrability of other terms identified by Applicant has no bearing on the question of



whether EL CABO and  are registrable. *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (“Even if some prior registrations had some characteristics similar to Nett Designs’ application, the PTO’s allowance of such prior registrations does not bind the Board or this court.”).

C. Conclusion

Considering Applicant’s specimen of use and all the record evidence, we find the



consumers will not perceive EL CABO and  as marks indicating the source of the identified television entertainment services in Class 41.¹⁹

Decision: The refusal to register Applicant’s proposed marks under Trademark Act Sections 1, 2, 3 and 45, 15 U.S.C. §§1051-1053, 1127, for failure to function as a mark is affirmed in both applications.

¹⁹ As discussed above, the applications are deemed abandoned as to the services identified in Class 38.